SUPREME COURT, U.S.
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No. 72-1634

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DESERT OUTDOOR ADVERTISING, INC.; ARTHUR SHIPKEY and BETTY SHIPKEY,
Petitioners,

vs.

CITY OF ESCONDIDO, a political subdivision of the State of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SWING, SCHARNIKOW, LEWIS & KROLL
By: DAVID K. KROLL

1401 U. S. National Bank Building
San Diego, California 92101
Telephone: (714) 239-1131
Attorneys for Petitioners

ARTS & CRAFTS PRESS, SAN DIEGO, CALIF.

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No._____

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California, entered February 6, 1973.

OPINIONS BELOW

The opinion by the California Supreme Court appears in Appendix A. The opinion by the Court of Appeal appears in Appendix B.

JURISDICTION

The decision of the Superior Court of San Diego County, California granting affirmative injunctive enforcement of a city ordinance was entered February 5, 1971. Said decision was reversed on Appeal by the Court of Appeal of California, Fourth Appellate District, Division One on June 21, 1972, and a Petition for Rehearing to that court was denied on July 7, 1972. A Petition for Hearing to the Supreme Court of California was granted September 11, 1972, and said Supreme Court entered a decision affirming the decision of the Superior Court on February 6, 1973. A Petition for Rehearing to the Supreme Court of California was denied on March 8, 1973, and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

QUESTIONS PRESENTED

(1) WHETHER PETITIONERS HAVE BEEN DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND HAVE BEEN DENIED THE EQUAL PROTECTION OF LAW WHEN THEY ASSERT THREE SEPARATE GROUNDS FOR REVERSAL OF A TRIAL COURT'S JUDGMENT AGAINST THEM, THE COURT OF APPEAL REVERSES THE JUDGMENT IN ITS ENTIRETY ON ONE OF THOSE GROUNDS (SPECIFICALLY FOREGOING CONSIDERATION OF THE OTHER TWO GROUNDS AS UNNECESSARY TO ITS DECISION), AND THE STATE SUPREME COURT REVERSES THE APPELLATE COURT'S DECISION AND AFFIRMS THE TRIAL COURT'S JUDGMENT WITH NO CONSIDERATION WHATEVER OF THE TWO REMAINING GROUNDS.

(2) WHETHER PETITIONERS HAVE BEEN DEPRIVED OF THE EQUAL PROTECTION OF THE LAW BY A CITY ZONING ORDINANCE THAT REQUIRES THE REMOVAL OF PETITIONER'S OUTDOOR ADVERTISING SIGNBOARD BY THE ARBITRARY AND UNREASONABLE CLASSIFICATION THAT PETITIONER'S SIGNBOARD IS LOCATED ADJACENT TO A "LIMITED ACCESS HIGHWAY," WHILE SIMILAR SIGNBOARDS ALONG ALL OTHER HIGHWAYS THROUGHOUT THE CITY ARE PERMITTED TO STAND.

CONSTITUTIONAL PROVISIONS INVOLVED

The "due process" and "equal protection" clauses of the 14th Amendment to the Constitution of the United States are directly involved and invoked by petitioners:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> U. S. Constitution, 14th Amendment, Section 1.

STATEMENT OF THE CASE

Petitioner DESERT OUTDOOR ADVERTISING, INC. (hereinafter referred to as "Desert Outdoor"), is a California corporation whose primary business is the erection and maintenance of outdoor advertising signboards. In May, 1963, Desert Outdoor purchased an existing signboard within the city limits of the City of Escondido, California, on real property owned by Petitioners ARTHUR SHIPKEY and BETTY SHIPKEY, located at the intersection of 17th Street and Highway U.S. 395. Said intersection is controlled by stop-lights in both directions. Access

is not permitted to Highway 395 directly from the SHIPKEY property, but access is available directly from 17th Street. U. S. 395 is thus a "freeway" at said location only in the sense that direct access is not available from each parcel of adjoining real property, but is available at intersections. The signboard in question was fully in compliance with all laws as of the date of its purchase by petitioners.

On July 23, 1965 the City of Escondido enacted Ordinance No. 1018 entitled "Freeway Sign Control" (a copy of which is attached hereto as Appendix C), which ordinance purports to outlaw and require the removal of advertising displays placed or maintained on property adjacent to "sign controlled freeways." A "sign controlled freeway" is defined in §9041 of said ordinance as a "divided arterial highway for through traffic with full or partial control of access, and which may or may not have grade separations at intersections." Specific exemptions are provided at Section 9043 so that the ordinance does not apply to advertising structures or signs which are used to advertise the offering for sale or lease of the property on which said advertising display is placed, to designate the name of the owner or occupant of the premises, or to advertise the business conducted or goods manufactured or produced or services rendered upon said property ("on-site" uses). Section 9048 provides that violations of the ordinance are criminal misdemeanors. Section 9045 provides that advertising displays which are in violation of the ordinance are "nuisances."

Ordinance 1018 was enacted as a general police-power ordinance, rather than a zoning ordinance which would have required noticed hearings, findings and a general plan, all in accordance with specific requirements of the California Government Code.

On June 9, 1969 Respondent, City of Escondido, filed the instant action, demanding that the signboard be removed as being a nuisance under the ordinance. Petitioners defended, claiming among other defenses that (1) the ordinance was invalid as an unreasonable exercise of the city's police power, in that it could validly be enacted only as a zoning ordinance in accordance with the Government Code; (2) removal of the signboard prior to its full amortization would constitute a taking of property without compensation, in violation of State and Federal statutes and constitutions; and (3) the judgment was invalid insofar as it required the removal of a signboard which was not in violation of the ordinance at the time of trial (the board was blank), and which could be used for the purposes permitted by the ordinance as an "on-site" signboard. The trial court held in favor of the City of Escondido, and entered a judgment ordering removal of the signboard within 90 days.

Petitioners appealed to the Court of Appeal on the three grounds stated above. On June 21, 1972, the Court of Appeal reversed the trial court's decision on Petitioners' first ground, and held that the ordinance was invalid as not having been enacted in conformity with the requirements of the Government Code. At the close of its Opinion, the Court of Appeal stated as follows: "The foregoing conclusions are determinative of this appeal, and we need not consider other contentions by defendants. The judgment is reversed."

The City of Escondido was then granted a hearing by the California Supreme Court. Additional briefs were filed, all of which dealt only with the one issue considered by the Court of Appeal. Argument was held on the one issue alone, and the California Supreme Court entered its decision on February 6,

1973, affirming the decision of the trial court. The Supreme Court agreed that an ordinance regulating the erection and maintenance of advertising signboards generally did have to be enacted in conformity to the requirements of the Government Code, but held that an exception existed for signs adjacent to freeways, which could be declared nuisances without reference to the Government Code. The California Supreme Court thus now holds, as a decision of first impression, that the classification of outdoor advertising signboards into two categories, based only on whether they are or are not adjacent to "limited access highways," is a valid classification. The City is thus empowered to destroy the one class of structures as "nuisances" by mere council resolution, while all other similar structures are given the full protection of the law.

Most importantly, the California Supreme Court completely failed to consider the second and third grounds for reversal previously urged by petitioners. Petitioners filed a Petition for Rehearing urging that the Supreme Court either consider the two additional grounds *de novo* on appeal, or remand the appeal back to the Court of Appeal for consideration of the two remaining grounds. The Petition for Rehearing was denied without opinion or comment on March 8, 1973.

HOW FEDERAL QUESTIONS ARE PRESENTED

The first question has been specifically presented by Petitioners' Petition for Rehearing to the California Supreme Court, wherein petitioners requested that the two remaining and unconsidered constitutional grounds for appeal be considered.

The second question has been raised at trial and at all appellate levels thereafter by petitioners' assertion that the city

ordinance requiring removal of the signboard is invalid and unconstitutional. The California Supreme Court held that the classification of the signboard as being located adjacent to a "limited access highway" was sufficient to validate the ordinance, even though the ordinance would be invalid as to signboards at other locations within the city.

REASONS FOR GRANTING THE WRIT

I

Petitioners have been denied due process by a novel and almost unique set of circumstances. The State of California has provided for appeals to appellate courts on constitutional issues. Petitioners availed themselves of this right and urged three separate grounds for appeal, one of which was that the city ordinance in question required the "taking," of their property, without compensation, in violation of the 14th Amendment. The appellate court reversed the trial court's judgment on a wholly separate ground, specifically omitting to consider the constitutional question. Thereafter, the State Supreme Court affirmed the trial court's ruling, but in doing so considered only the ground ruled upon by the Court of Appeal. *The remaining constitutional ground has never been ruled upon by either appellate court.*

This Supreme Court has held that although a state is not constitutionally required to provide a system of appellate court review, once it does so, it must conduct the appellate proceedings so as not to deny due process to the litigants. See *National Union* v. *Arnold*, 348 U.S. 37 (1954) and Justice Black's dissenting opinion at page 45 of that decision. In *Cole* v. *Arkansas*, 333 U.S. 196 (1947), the court stated as follows:

> "Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall. . . . *Petitioners urged in the State Supreme Court that the evidence was insufficient to support their convictions of a violation of §2. They also raised serious objections to the validity of that section under the 14th Amendment to the Federal Constitution. None of their contentions were passed on by the State Supreme Court.* . . . To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." (emphasis added) 333 U.S. at 201-202.

In the case at bar, petitioners have not been afforded the process of law that the State of California has provided for all litigants. The Court of Appeal singled out one of petitioners' three grounds for appeal and reversed the trial court's judgment on that ground alone. The appellate court stated that, "The foregoing conclusions are determinative of this appeal, and we need not consider other contentions by defendants." Later, when the State Supreme Court in effect reversed the decision of the Court of Appeal, the remaining grounds of appeal were completely overlooked. When petitioners brought this omission to the Supreme Court's attention by Petition for Rehearing, the Petition for Rehearing was summarily denied.

Petitioners have thus been foreclosed from full consideration of their appeal by the appellate process of the State of California. In accordance with the *National Union* and *Cole* cases, *supra*, this Supreme Court should grant certiorari to establish the rule that due judicial process does require a full determination of all constitutional issues raised by a litigant on appeal.

II

The law is clear that an ordinance which arbitrarily and unreasonably discriminates against a specific class or classifications of businesses deprives that business of the equal protection of the laws. See e.g. *Morey* v. *Doud*, 354 U.S. 457 (1956); *Hartford Co.* v. *Harrison*, 301 U.S. 459 (1936). These cases and a myriad of others hold that in order for a statutory discrimination to be valid, it must be based on differences that are reasonably related to the purposes of the Act in which it is found, and cannot be merely arbitrary or capricious.

In the case at bar, the city ordinance requires the removal without compensation of a single classification of signboards, those adjacent to limited access highways. Similar signboards adjacent to all other highways in the city are permitted to stand. There is no rational basis for such discrimination. All factors which apply to a signboard in one location are also applicable to signboards in other locations. Petitioners' signboard is located at a stop-light controlled intersection, similar to innumerable other intersections throughout the city. The mere fact that there is limited access to one of the streets is a distinction without a difference. Respondents cannot show that there are factors which apply to one location that do not also apply to the other.

CONCLUSION

Petitioners urge that certiorari be granted and the ruling of the Supreme Court of California reversed.

Respectfully submitted,

SWING, SCHARNIKOW,
LEWIS & KROLL

BY _____
DAVID K. KROLL

Attorneys for Petitioners

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

CITY OF ESCONDIDO, *Plaintiff and Respondent,* **vs.** DESERT OUTDOOR ADVERTISING, INC., *Defendants and Appellants.*	L.A. 30061 Super. Ct. 312192

In this case we are asked to decide whether, under applicable law as it existed in 1965, a general law city could regulate the placement of signs and billboards along freeways without the necessity of complying with the law governing the adoption of zoning ordinances.

City of Escondido ("City"), a general law city, asserts that Government Code section 38774[1] authorized cities to regulate the

[1]Section 38774, contained in an article of the Government Code pertaining to "Nuisances," provides that "The legislative body [of a city] may:

"(a) Regulate the exhibition, posting, or carrying of banners, placards, posters, cards, pictures, signs, or advertisements in or on the street, or on or upon buildings, fences, billboards, or other structures; or on or upon any pole in any sidewalk, alley, street, lane, court, park, or other public place.

"(b) Regulate the suspension of banners, flags, signs, advertisements, posters, pictures, or cards across or over any sidewalk, alley, street, lane, court, park, or other public place, or such suspension from fences, poles, houses, or other structures."

Other sections of the article permit a city to declare by ordinance what constitutes a nuisance (§38771), to provide for the summary abatement of any nuisance (§38773), and to "prohibit and prevent encroachments upon or obstruction in or to any sidewalks, street, alley, lane, court, park, or other public place and provide for the removal of such encroachment or obstruction." (§38775.)

placement of such signs and billboards by the enactment of an ordinance adopted in the manner prescribed for the adoption of ordinance generally.[2] Defendants, an outdoor advertising company and property owners on whose land the billboard at issue is located, assert instead that former Government Code section 65800[3], in effect when City's ordinance was enacted, required that regulation of the placement of signs and billboards along freeways be done only by the enactment of a zoning ordinance adopted in the manner required by law for the regulation of the uses to which private property may be put. *We have concluded that City's ordinance was authorized by the provisions of section 38774, and*

[2]See Government Code sections 36931 et seq.

[3]Former section 65800 provided that "Pursuant to the provisions of this chapter ["zoning regulations], the legislative body of any county or city by ordinance may:

"(a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes.

"(b) Regulate location, height, bluk, number of stories, and size of buildings and structures; the sizes of yards, courts and other open spaces; the percentage of a lot which may be occupied by a building or structure. . . ."

In 1965, following the enactment of City's ordinance, section 65850 was adopted, with substantially identical language as former section 65800, but including as new subdivision (b) the words "Regulate signs and billboards." Therefore, the new section expressly includes signs and billboards within the type of structures which could be regulated by a zoning ordinance.

Thereafter, in 1967, section 5288.7 was added to the Business and Professions Code as part of the so-called "Outdoor Advertising Act." That section, now renumbered as section 5230, permits cities and counties to enact ordinances "including, but not limited to, land use or zoning ordinances, imposing restrictions on advertising displays [which would include signs and structures, under §5202] adjacent to any street, road, or highway equal to or greater than those imposed by this chapter." Therefore, in spite of the expansion of the Planning and Zoning Act to include regulation of signs and billboards by zoning laws [Gov. Code, §65850, subd. (b)], cities appear to retain, under section 5230 of the Business and Professions Code, authority to regulate such matters by general ordinance. Note, however, that section 5230 and other provisions of the Outdoor Advertising Act apply only to a limited extent to advertising displays in incorporated areas. (Bus. & Prof. Code, §5271.)

that compliance with zoning law procedures was therefore unnecessary.

City's ordinance was enacted on June 23, 1965 and took effect on July 23, 1965. That ordinance, entitled "Freeway Sign Control," prohibits the placing or maintaining of advertising signs, structures, or displays on property adjacent to freeways and declares that the placement or maintenance of advertising displays on such property (following a three-year grace period) is a nuisance.[4] City admits that the ordinance was not enacted in accordance with the procedural requirements for the enactment of zoning ordinances but asserts that it was properly adopted under the procedures for the enactment of general city ordinances under City's police power.[5]

The trial court found that the signboard violated the ordinance and ordered that it be removed within 90 days. Defendants have appealed the adverse judgment. In essence, defendants contend that Government Code section 38774 does not authorize a city to regulate the erection, maintenance or location of signboards but only the exhibition and posting of advertisements on such signboards. In other words, defendants would restrict the application of section 38774 to the placement of advertisements on signboards, and not to the placement of signboard structures on

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[4]City's ordinance also exempts from its provisions any advertising display which offers for sale or lease the property upon which the display stands, which designates the name of the property owner or identifies the property, or which advertises the business conducted on the property.

[5]The constitutional authority of a general law city such as plaintiff is limited to the enactment of ordinances "not in conflict with general laws." (Former art. XI, §11, now art. XI, §7.) One such "general law" is the so-called "Planning and Zoning Law" (Gov Code, §65000 et seq.) which, in 1965, required a public hearing before the planning commission, commission approval by at least a two-thirds vote, and city council adoption following an additional public hearing, in order to enact a zoning measure. (See former Gov. Code, §§65650-65654, 65803, stats. 1953, ch. 1355, pp. 2924, 2927.) City contends that its ordinance was not enacted as a zoning measure under the authority of the Planning and Zoning Act, but as a police power measure expressly authorized by Government Code section 38774.

property adjacent to public streets. *We believe, however, that defendants' interpretation of section 38774 is too narrow, and that the section would authorize the regulation of signboard structures which, by reason of their proximity to a freeway, have been declared to be nuisances.*

Section 38774 grants cities the authority to ". . . Regulate the exhibition [and] posting . . . of . . . signs, or advertisements in or on the street, or on or upon . . . billboards, or other structures . . ." *The word "signs" reasonably may be construed to include the signboard structures themselves, given the evident purpose underlying section 38774 to permit municipal regulation of potential nuisances* arising from the proximity of various types of outdoor advertising to streets, buildings and other public places.

As we have seen (fn. 1, *ante*), section 38774 is one of a group of sections which empower cities to regulate nuisances. Under section 38771, "By ordinance the city legislative body may declare what constitutes a nuisance," and under section 38773, a city may be ordinance provide for the abatement of a nuisance. Section 38774 specifies a particular type of nuisance subject to municipal control, and authorizes cities to "regulate" the exhibition and posting of signs and advertisements.

On the other hand, former Government Code section 65800, subdivision (b), on which defendants rely, made no reference to advertising signs and billboards, but merely authorized the legislative body to adopt ordinances regulating the location of buildings and "structures." That section constituted the authority for cities to enact comprehensive zoning ordinances generally, in accordance with specified procedures. (See fn. 5, *ante*.) It is a fundamental rule of statutory construction that when a general statute appears to conflict with a special act, the latter will be considered an exception to the former. (People v. Gilbert, 1 Cal.3d 475, 479-480; see 45 Cal.Jur.2d, Statutes, §120, and cases cited.) Accordingly, we deem section 38774 an exception to the general provisions of former section 65800, and we conclude that City's or-

dinance was not required to be enacted in accordance with zoning ordinance procedures.

We do not not view our interpretation of section 38774 as vesting a city with unreasonably broad police powers in this area. Although it is generally held that a municipality's power to regulate lawful businesses may not be used to prohibit them entirely (see Parker v. Colburn, 196 Cal. 169, 176; 3 Witkin, Summary of California Law, Constitutional Law, §160, p. 1971; 11 Cal.Jur.2d, Constitutional Law, §149, p. 529, and fn. 14), that rule does not apply to a business whose operation constitutes a nuisance, inimical to the public welfare (see Sunset Amusement Co. v. Board of Police Commissioners, 7 Cal.3d 64, 80; Jones v. City of Los Angeles, 211 Cal. 304, 315). *It should be remembered that, in the instant case, City's ordinance declares advertising adjacent to its freeways to be a nuisance, and that the reach of section 38774 seemingly extends no further than to permit regulation of such nuisances.* (See fn. 1, *ante*.)

Moreover, City's ordinance does not purport to prohibit all signs and advertisements but only to regulate their location so that they do not constitute nuisances and for the obvious purposes of promoting highway safety as well as enhancing community aesthetic values. The case of Varney & Green v. Williams, 155 Cal. 318, is readily distinguishable. There the court held invalid an ordinance which forbade all advertising billboards within city limits. (See also Metromedia, Inc. v. City of Pasadena, 216 Cal.App.2d 270, 273-274.)

We emphasize that ordinarily municipalities must follow statutory or charter zoning procedures strictly whenever they propose a substantial interference with land use, for such procedures are constitutionally mandated to insure that private property owners receive due process of law. (See Scott v. City of Indian Wells, 6 Cal.3d 541, 549; Hurst v. City of Burlingame, 207 Cal. 134, 141; 55 Cal.Jur.2d, Zoning, §109; McQuillin, Municipal Corporation, §§25.40, 25.46.) In the instant case, however, de-

fendants have failed to establish any such substantial interference. In plaintiff's view, section 38774 would permit the exclusion of signboards adjacent to freeways, whereas, under defendants' interpretation, only the advertisements themselves could be prohibited. Since the practical effect (in terms of restricted land use) would be the same, it is evident that we must scrutinize not the method but the *extent* of City's regulation in order to determine whether zoning procedures should have been followed. (See McQuillin, *supra*, §25.53.) *Whether a particular interference with, or restriction upon, land use is a substantial one, requiring compliance with applicable zoning procedures, can be determined only by examining the facts of each particiular case.* (*Id.*, §25.46.) In the instant case, City's ordinance is narrowly limited to advertising displays adjacent to freeways and designed to be viewed primarily by freeway travelers; reasonable exemptions are made for advertisements affecting the property upon which the signboards stand. We conclude that the restrictions upon land use resulting from City's ordinance were minimal, and that accordingly that ordinance was properly enacted as a general police measure under section 38774 of the Government Code[6].

The judgment is affirmed.

BURKE, J.

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[6]Defendants have also argued that the Outdoor Advertising Act (Bus. & Prof. Code, §5200 et seq.), in effect when City's ordinance was enacted, preempted the regulation of advertising displays, including structures maintained for outdoor advertising purposes (See Bus. & Prof. Code, §§5204, 5205), except by local ordinances enacted in accordance with the Planning and Zoning Law (former Gov. Code, §65000 et seq.). (See former Bus. & Prof. Code, §5227.) Yet former section 5226 of the Act specifically excluded from the Act's operation territory located within incorporated cities and towns, and former section 5227 pertained to *counties*, not cities. Accordingly, the Outdoor Advertising Act did not restrict City's authority to adopt Ordinance No. 1018.

WE CONCUR:
SULLIVAN (Acting C. J.)
McCOMB (J.)
TOBRINER (J.)
MOSK (J.)
SCHAUER (J.*)

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B

APPENDIX B

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

CITY OF ESCONDIDO, *Plaintiff and Respondent,* vs. DESERT OUTDOOR ADVERTISING, INC., et al., *Defendants and Appellants*	4 Civ. No. 11052 (Sup. Ct. No. 312192) OPINION

APPEAL from a judgment of the Superior Court of San Diego County. Roscoe S. Wilkey, Judge. Reversed.

Swing, Scharnikow, Lewis & Kroll and David K. Kroll, for Defendants and Appellants.

Walker & Gann and Roy H. Gann, for Plaintiff and Respondent.

Defendants appeal from a judgment in an action instituted by plaintiff declaring a signboard on property adjoining an arterial divided highway in the City of Escondido violates Ordinance No. 1018 of that city, adopted June 23, 1965; and ordering removal thereof within 90 days.

Defendant Desert Outdoor Advertising, Inc. is the owner of the signboard, purchased in May, 1963, and defendants Arthur Shipkey and Betty Shipkey, are owners of the land upon which the signboard has been located since that date.

Initially defendants contend Ordinance 1018 is invalid because it was not enacted in the manner prescribed by the Planning

Law, i.e., former Government Code sections 65000 et seq., governing the enactment of zoning ordinances, upon which the authority of the city to regulate signboards was predicated.[1]

Plaintiff concedes the ordinance was not enacted in the manner prescribed by the Planning Law but contends it is valid as an exercise of the police power conferred upon municipalities by former section 11, article 11 of the California Constitution and sections 37100, 38774 and 38771 of the Government Code, which may be exercised by enactment of an ordinance in the manner prescribed for the adoption of ordinances generally.

Defendants premise their contention on the claim the Outdoor Advertising Act (Bus. & Prof. Code §§5200 et seq.), in effect when the ordinance was enacted, preempted the regulation of advertising displays, which includes a structure maintained for outdoor advertising purposes (Bus. & Prof. Code §§5204, 5205), except by local ordinance enacted pursuant to the Planning Law, i.e., former Government Code sections 65000 et seq., citing former Business and Professions Code section 5227 [Stats. 1961, ch. 440, p. 1513] and the decision in *County of Santa Barbara* v. *Purcell, Inc.*, 251 Cal.App.2d 169, as determinative of the issue. Reliance upon former section 5227 and the cited case is misplaced; section 5227 excluded from its preemption provisions county zoning regulations affecting the placing of advertising displays enacted in accordance with the provisions of the Planning Law; the decision in County of *Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App. 2d 169, involved a county zoning ordinance, not a city ordinance, regulating signboards; and the provisions of the Outdoor Advertising Act, in effect when Ordinance 1018 was enacted, did not

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Footnote 1: Defendants refer to Government Code sections 65000 et seq. enacted in 1965, which became effective September 17, 1965, and were not in effect on June 23, 1965, when Ordinance 1018 was enacted. Applicable Government Code sections in effect on the latter date were enacted in 1953 [stats. 1953, ch. 1355, pp. 2913 et seq.]; in 1956 [stats. 1956, ch. 33, pp. 359 et seq.]; in 1959 [stats. 1959, ch. 745, p. 2735]; and in 1961 [stats. 1961, ch. 1111, p. 2836].

apply to advertising displays within the view of highways located in "incorporated cities and towns" (former Bus. & Prof. Code §5226 [stats. 1939, ch. 32, p. 334]), thus excluding from the preemption declared by section 5227, the regulation of such advertising displays within cities.

We conclude the provisions of the Outdoor Advertising Act in effect in 1965 did not proscribe enactment of an ordinance by a city, in the exercise of its police power, regulating signboards. However, this conclusion is not determinative of the contention attacking the validity of Ordinance 1018 upon the ground it is a zoning ordinance not adopted in the manner prescribed by the Planning Law.

The judgment at bench declares:

> "... the advertising signboard owned by defendant, Desert Outdoor Advertising, Inc., situated on real property owned by defendants, Arthur H. Shipkey and Betty Shipkey, is in violation of Ordinance No. 1018 of the City of Escondido, California;"

and orders defendants to remove the advertising signboard within 90 days.

Uncontradicted and unimpeached evidence establishes, at the time of the trial there was no advertising material on the signboard in question; the face thereof had been painted white; and it was blank.

The constitutionally conferred authority of a city to exercise the police power by ordinance and regulation is limited to that "not in conflict with general laws." (Former Art. 11, §11, Calif. Const.) The power thus conferred includes the power to regulate outdoor advertising displays by ordinance. (*County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169, 175.) However, the issue at bench is the manner of the exercise of that power. Defendants contend it may be exercised only by enactment of a zoning ordinance, whereas plaintiff contends its exercise is not so

limited but may be exercised by an enactment of an ordinance in the manner prescribed for the enactment of an ordinance generally. Pertinent provisions of the Planning Law, in effect when Ordinance 1018 was enacted, required a public hearing before the Planning Commission; notice of such a hearing; a resolution of the Planning Commission adopted by not less than two-thirds of the total voting members of the commission; and adoption of the resolution by the City Council following a hearing upon notice by publication (Govt. Code §65803 [stats. 1953, ch. 1355, p. 2927]; Govt. Code §§65650 et seq. [stats. 1953, ch. 1355, pp. 2724 et seq.]).

The procedure prerequisite to the exercise of a police power "by a city organized under general law is subject to and controlled by general law." (Gen. see *City and County of S.F.* v. *Boyd*, 22 Cal.2d 685, 692; *Sullivan* v. *McKinley*, 14 Cal.2d 113, 117; *San Pedro etc. R. Co.* v. *Long Beach*, 172 Cal. 631, 634.) Thus the method prescribed by the general law for the enactment of a zoning ordinance, which is an exercise of the police power, is binding on a general law city and the enactment of such an ordinance by any other method is contrary to general law and ineffective. (*Hurst* v. *City of Burlingame*, 207 Cal. 134, 138; *Williams* v. *City of San Bruno*, 217 Cal.App.2d 480, 486.) Plaintiff is a general law city. Its contention Ordinance 1018 was not enacted in the exercise of its authority to adopt a zoning ordinance, and for this reason it was not required to comply with the enactment procedures prescribed by the statute governing the adoption of zoning ordinances, requires a determination whether Ordinance 1018 was enacted under a statute prescribing a different method of adoption. (See Govt. Code §§36934 et seq.) In 1965 plaintiff was authorized to regulate outdoor advertising either by enactment of zoning ordinances pursuant to the Planning Law then in effect (See fn. 1), or by an ordinance pursuant to Government Code section 38774. However, the nature of the regulation which might be adopted under either of these statutes was not identical. By the Planning

Law plaintiff was authorized to adopt an ordinance regulating the location of structures and establishing building setback lines on any highway. (Former Govt. Code §65800 [stats. 1961, ch. 1111, p. 2836].) Fundamentally, the Planning Law was a statute authorizing the regulation of the use of land. The regulation of signboards, i.e., advertising structures, was within its provisions. (*County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169, 171, 172, 175.) By Government Code section 38774, plaintiff was authorized to adopt an ordinance regulating "the exhibition, posting, or carrying of . . . pictures, signs or advertisements . . . on or upon buildings, fences, billboards, or other structures . . ." This code section, as compared with the Planning Law, did not authorize a city to regulate the location of signboards as such; instead, it authorized only regulation of the exhibition and posting of advertisements on signboards; and even though it may have authorized the adoption of an ordinance proscribing the exhibition of advertisements on signboards in a particular location, it did not authorize adoption of an ordinance proscribing the erection and maintenance of such signboards. The Planning Law in 1965, insofar as it authorized a city to regulate the location of signboards not used for the exhibition of advertisements was exclusive; prescribed the manner of enacting an ordinance effecting such regulation; and, in substance, foreclosed the adoption of such an ordinance in any other manner as contrary to the general law, even though the ordinance was an exercise of the constitutionally conferred police power.

Plaintiff's reliance, in support of its position, on Business & Professions Code section 5288.7, added in 1967, (stats. 1967, ch. 1408, p. 3316) is misplaced. The 1967 statute conferred upon cities authority not theretofore conferred, to "enact ordinances, *including but not limited to land use or zoning ordinances,* imposing restrictions on advertising displays adjacent to any street, road or highway," which by definition included signboards, "equal to or greater than those imposed" by the Outdoor Advertising Act

(Italics ours): provided alternate procedures for the exercise of the police power to regulate signboards, i.e., by an ordinance enacted pursuant to the procedure prescribed by a zoning law or by an ordinance enacted pursuant to the procedure prescribed for the enactment of ordinances generally; and eliminated the conflict formerly caused by the enactment of an ordinance regulating signboards as an exercise of the constitutionally conferred police power when the ordinance was enacted pursuant to the procedure prescribed for the enactment of ordinances generally rather than pursuant to the procedure prescribed by the Planning Law.

Ordinance 1018 proscribes placing or maintaining an "advertising display" on property adjacent to a divided, arterial highway; and defines an "advertising display" as, among other things, "a structure of any kind or character erected or maintained for outdoor advertising purposes on which any poster . . . or other advertisement of any kind whatsoever may be placed . . ."; regulates the use of the land on which signboards are placed or maintained by proscribing the placement or maintenance thereof on land adjacent to a highway; does not regulate the exhibition or posing of advertisements on such signboards; and is an ordinance which, on June 23, 1965, could have been enacted only under and in compliance with the procedure prescribed by the Planning Law.

Demonstrative of the difference between an ordinance authorized by the Planning Law and an ordinance authorized by Government Code section 38774, is the situation in the case at bench where, on the date of the judgment, the structure ordered removed was not being used for advertising purposes; no advertisements were exhibited or posted thereon; it was a blank signboard painted white; and could have been used for purposes permitted by the ordinance, which exempts from its provisions advertising structures which are used exclusively to advertise for sale or lease the property on which the structure is located, to designate the name of the owner or occupant of the premises, to identify the premises and to advertise the business conducted, goods manufactured or

produced, or the services rendered on the premises. (Escondido Munic. Code §§9041, 9043; gen. see *National Advertising Co.* v. *County of Monterey*, 211 Cal.App.2d 375, 382.)

The foregoing conclusions are determinative of this appeal, and we need not consider other contentions by defendants.

The judgment is reversed.

COUGHLIN (J.*)

WE CONCUR:
BROWN (P. J.)
WHELAN (J.)
*Assigned by Chairman of Judicial Council.

APPENDIX C

APPENDIX C

ORDINANCE NO. 1018

AN ORDINANCE OF THE CITY OF ESCONDIDO AMENDING DIVISION 9, CHAPTER 90 OF THE ESCONDIDO MUNICIPAL CODE BY ADDING THERETO ARTICLE 904, ENTITLED "FREEWAY SIGN CONTROL," CONSISTING OF SECTIONS 9041 THROUGH 9050.

The City Council of the City of Escondido DOES HEREBY ORDAIN as follows:

SECTION 1. That Division 9, Chapter 90 of the Escondido Municipal Code is hereby amended by adding thereto Article 904, entitled "Freeway Sign Control," including Sections 9041 through 9050 to read as follows:

Article 904, FREEWAY SIGN CONTROL

Section 9041. Definitions. As used in this article, certain terms are defined as follows:

(a) ADVERTISING STRUCTURE. Refers to a structure of any kind or character erected or maintained for outdoor advertising purposes on which any poster, bill, printing, painting, or other advertisement of any kind whatsoever may be placed, including statuary.

(b) SIGN. Refers to any card, cloth, metal, painted or wooden sign of any character, placed for outdoor advertising purposes, on or in the ground, or any tree, wall, bush, rock, fence, building, structure, or thing, either publicly or privately owned, other than an advertising structure.

(c) Neither "Advertising Structure" or "Sign", as used in this article includes:

1. Official notices issued by a court or public body or officer.
2. Notices posted by any public officer in performance of a public duty, or by any person in giving legal notice.

3. Directional, warning, or information signs or structures required or authorized by law.

(d) ADVERTISING DISPLAY. Refers to advertising structures and to signs.

(e) "SIGN CONTROLLED FREEWAY". The term sign controlled freeway means a divided arterial highway for through traffic, with full or partial control of access, and which may or may not have grade separations at intersections.

(f) TO PLACE. The verb "to place" and any of its variants as applied to advertising displays includes the maintaining and the erecting, constructing, posting, painting, printing, tacking, nailing, glueing, stitching, carving, or otherwise fastening, affixing, or making visible, any advertising display on or to the ground, or any tree, bush, rock, fench, post, wall, building, structure, or thing.

SECTION 9042. Advertising Displays Adjacent to Sign Controlled Freeways. No advertising displays shall be *placed or maintained* on property adjacent to a sign controlled freeway as defined herein, if the advertising display is designed to be viewed primarily by persons traveling on such freeway.

SECTION 9043. Exempt Advertising Displays. The provision of Section 9042 shall not apply to any of the following listed advertising structures or signs which are used exclusively:

(a) To advertise the offering for sale or for lease of the property on which said advertising display is placed;

(b) To designate the name of the owner or occupant of the premises upon which said advertising display is placed or to identify such premises.

(c) To advertise the business conducted or goods manufactured or produced, or services rendered upon the property upon which said advertising display is placed.

SECTION 9044. Removal of Prohibited Displays. Any advertising structure or sign which is now, or hereafter may

be, in violation of the provisions of Section 9042 shall be removed within three (3) years from the effective date of this ordinance.

SECTION 9045. Prohibited Displays as Nuisances. All advertising displays which are placed or which exist in violation of the provisions of this article are public nuisances, and may be removed by any public employee after ten (10) days written notice posted on the structure or sign and a copy forwarded by mail to the display owner at his last known address.

SECTION 9046. Removal of Temporary Signs. Notwithstanding any other provision of this article the City Manager or any authorized employee may summarily and without notice remove and destroy any advertising display placed in violation of this article which, because of the materials of which it is constructed, or because of the nature of the copy thereon is temporary in nature.

SECTION 9047. Entry Upon Private Property. For the purposes of removing or destroying any advertising display placed in violation of the provisions of this chapter the City Manager or his authorized agent may enter upon private property without incurring any liability for trespass therefor.

SECTION 9048. Violations as Misdemeanors. Every person as principal, agent, or employee, violating any of the provisions of this article is guilty of a misdemeanor.

SECTION 9049. Remedies cumulative to this Article. The remedies provided in this Article for the removal of illegal advertising displays are cumulative and not exclusive of any other remedies provided by law.

SECTION 9050. Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is, for any reason, held to be invalid, or unconstitutional, by the decision of any court of competent jurisdiction, such decision shall not affect the remaining portions of this ordinance.

SECTION 2. The City Clerk shall certify to the passage of this ordinance and cause the same to be published once within fifteen days of its passage in the Escondido Daily Times-Advocate, a newspaper of general circulation printed and published in the City of Escondido.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Escondido at a regular meeting held on the 23rd day of June, 1965, by the following vote, to wit:

AYES: Councilmen Harding, Roberts, Speers, Turrentine, Tustin
NOES: Councilmen None
ABSENT: Councilmen None

APPROVED:
/s/ Lewis P. Tustin
LEWIS P. TUSTIN, Mayor of the
City of Escondido, California

ATTEST:
/s/ Lina M. Hill
LINA M. HILL, City Clerk of the
City of Escondido, California

CLERK'S OFFICE, SUPREME COURT

4250 State Building

San Francisco, California 94102

March 8, 1973

Dear Sir:

I have this day filed Order

REHEARING DENIED

In re: L. A. No. 30061

CITY OF ESCONDIDO

vs.

DESERT OUTDOOR ADVERTISING, INC.

Respectfully,

G. E. Bishel, Clerk